Supreme Court, U.S.
FILED
AUG - 6 2003
OFFICE OF THE CLERK

No. 03-37

# In the Supreme Court of the United States

INFINEON TECHNOLOGIES AG, ET AL.,

*Petitioner,*

v.

RAMBUS, INC.,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## BRIEF OF ADVANCED MICRO DEVICES, INC.; HYNIX SEMICONDUCTOR AMERICA, INC.; MICRON TECHNOLOGY, INC.; MINDSPEED TECHNOLOGY, INC.; and NVIDIA CORPORATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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## INTEREST OF THE AMICI CURIAE[1]

The *amici* are members of the electronics, semiconductor and telecommunications industries who participate extensively in the private industry standards setting process through their membership in various voluntary standards setting organizations ("SSOs"). That process, which is deeply impacted by the decision in this case, critically affects the development of new products and technology, and is fundamental to the existence of competition and productivity, in these and other industries.

Together, the *amici* contribute billions of dollars in sales to the world economy, hold thousands of United States patents and maintain membership in a wide array of SSOs. Many, if not most, of the products sold by the *amici* incorporate technology that complies with some form of industry standard. Industry standards apply to the technology embodied in the products of the *amici* in various ways, including, for example, how the products of different manufacturers operate correctly in combination with one another, how the products comply with applicable government regulations relating to things such as safety or performance, or what processes are used in the manufacture of the products. In the absence of open industry standards, many of the products that *amici* make and sell could not have been brought to market in the form that consumers use them today or at prices consumers have become accustomed to paying.

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[1] In accordance with Supreme Court Rule 37.6, the *amici* state that this brief was authored in its entirety by the counsel listed on the cover and that counsel to a party did not author this brief in whole or in part. No person or entity other than the *amici* or their counsel made a monetary contribution for the preparation or the submission of this brief. Petitioner has lodged a global consent. The consent of Respondent is being lodged herewith.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Federal Circuit has precipitated a crisis in confidence that poses a severe impediment to the development of open standards in industries that are critical to the world economy. The Federal Circuit's decision nullified a rule—adopted voluntarily by members of an SSO—designed to protect suppliers and consumers from being surprised by patent claims against standardized products years after the standards were adopted. Many such patent claims secure their strength not from the inherent merit of the patented invention, but from the industry agreement to standardize. In real world terms, the decision below presents the opportunity to reap a windfall to a firm that deliberately defrauded one of the most important SSOs in the world. This windfall may grow ever greater because the cost of changing the embedded standard has become prohibitive with the passage of time. Ultimately, all users of personal computers and other electronic products, virtually every aspect of the world economy, will have to pay this toll. If the Federal Circuit's decision stands, SSOs cannot have confidence in their ability to protect themselves, or the consuming public, from such exactions because the Federal Circuit, the court most likely to review such cases, arrogates to itself the right to decide—*de novo*—what SSO patent disclosure policies are reasonable.

The enormous importance of the process by which industry participants determine what technologies to adopt to ensure the compatibility and interoperability of their products cannot be overstated. As one commentator has put it: "Without standardization there wouldn't be a modern

economy."[2] The businesses in which the *amici* participate are among the most affected—but not the only ones affected—by this ruling.

The most fundamental flaw in the decision below lies in the Federal Circuit's substitution of its own, arbitrary view of what the JEDEC patent disclosure duty ought to have been for the duty that was actually adopted by JEDEC's members. The differences between the duties are profound. JEDEC's written patent policy, like those of many other SSOs, was intended to mean—and JEDEC's members understood it to mean—that disclosure was required of known patents and patent applications that related to the work being undertaken by JEDEC. A federal jury found that Rambus committed fraud when, by its own admission, it sent representatives to JEDEC meetings in which the SDRAM standards were being developed and then secretly and intentionally amended its pending patent claims to cover the developing standards. Rambus did not hide from its conduct. To the contrary, it unabashedly argued that its conduct was permissible under the JEDEC policy and not at all fraudulent. The district court, who heard the same trial evidence, denied Rambus' request to overturn the fraud verdict.

The Federal Circuit did overturn the verdict. In so doing, that court did not find the lack of a sufficient evidentiary basis for the jury's findings as to Rambus' conduct or what JEDEC's written patent policy meant. The basis of the reversal was grounded solely on the view that the JEDEC patent disclosure policy was too "vague" to impose a legal duty on Rambus. Rejecting well supported findings necessarily made by the jury, the Federal Circuit re-analyzed

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[2] Mark A. Lemley, *Intellectual Property Rights and Standard Setting Organizations*, 90 Cal. L. Rev. 1889, 1892 (2002), *quoting*, James Surowiecki, *Turn of the Century*, Wired, Jan. 2002, at 85.

the trial evidence and discovered a different, much more narrowly tailored duty. The Federal Circuit then concluded—without benefit of a new trial—that Rambus had not violated this new, more narrow duty.

The Federal Circuit's adoption of a narrow and previously unknown disclosure duty in place of the duty that was actually adopted will have profound policy implications across the many industries that rely upon open standards. The Federal Circuit's decision effectively amends JEDEC's patent disclosure policy *ex post facto*. The overhang of this precedent will significantly disrupt the development of open standards, because no set of terms is so free of ambiguity in all situations that clever evasions are not possible. The decision thus threatens to delay implementation of standards governing new technologies, depriving consumers of the benefits of these technologies potentially for years. It makes it more difficult and costly for participants in SSOs to determine whether they are in compliance with the disclosure duty. And the decision provides an open invitation to game the system by avoiding disclosure of known patents or patent applications that will later be asserted against industry members practicing the newly adopted standards.

The Court should grant the petition for *certiorari* and reverse the Federal Circuit's judgment in this case not only because it violates the constitutional norms for review of jury trials as the petition explains, but also because it represents fundamentally bad public policy—policy that is bad for the development and adoption of new technology and therefore bad for competition and bad for consumers.

## ARGUMENT

### A. Voluntary Industry Standards Setting Organizations Are Critical To Open And Fair Competition.

Industry standards are critical to open and fair competition across many industries, including those in which the *amici* participate. Without the technical means to operate together, products such as computer memory chips and microprocessor chips (to take a single example) could not communicate with each other. Computers would not be built, as they are today, using the parts of different, competing manufacturers. Computers also would not be able to communicate with one another. Standards allow consumers to share information over computer networks, even where computers or software from different manufacturers are used on either end of the transmission. It is no overstatement to say that the economic benefits that consumers throughout the world enjoy today as a result of computer and telecommunications networks such as the Internet could not exist without the means to efficiently and openly standardize technologies used by multiple manufacturers.

The example is easily extended to other industries as well, from automated teller machines and tape recorders to electrical conduits and plastics, where inter-operability and compatibility of parts made by different manufacturers are important.[3] Such inter-operability and compatibility—and

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[3] *See, e.g., Stambler v. Diebold, Inc.*, 11 U.S.P.Q.2d 1709 (E.D.N.Y. 1988) (discussing standards issues in relation to development of technology for automated teller machines), *aff'd*, 878 F.2d 1445 (Fed. Cir. 1989); *Potter Inst. Co. v. Storage Tech. Corp.*, 207 U.S.P.Q. 763 (E.D. Va. 1980) (same regarding technology for magnetic tape recording systems); *W.L. Gore &*

the free and open competition that it allows—produces distinct cost advantages for both manufacturers and consumers. Without open standards, consumers could be locked-in to the proprietary systems of single manufacturers. Competition and choice would be diminished or non-existent. Prices would inevitably increase. Development of industries critical to economic growth and the improvement of human welfare worldwide would be retarded.

Industry standards are often created privately by industry members who participate in SSOs. Standard setting in this way has many advantages over government-imposed regulation. SSOs bring to bear the collective creativity, wisdom and experience of the entire industry to determine the best technology to use to solve a particular problem, taking into account relevant factors such as technical merit, cost, availability and technological alternatives.

To function effectively, most SSOs want to be aware of any legal impediments that might exist if they adopt a particular standardized technology. One such possible impediment is the existence of patents. While patents often encourage technical innovation they can also be used to impede the efficient development of standards. If patent holders refuse to license patented technology necessary to practice an industry standard on reasonable terms and conditions, technological choices may be limited or costs increased. It may become impractical to switch to alternate technologies that might have been preferable if the existence of blocking patents had been known.

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*Associates, Inc. v. International Medical Prosthetics*, 1990 WL 180490 (D. Ariz. 1990) (discussing standards for plastics materials); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (discussing standard setting for electrical conduits).

Knowledge of the existence of patents—or potential patents in the form of pending patent applications—that may impact technology under consideration for adoption as a standard is therefore critical to any efficient voluntary standards setting scheme. It is sometimes the case that the patented technology is superior to alternative technology and may be desirable for incorporation into an industry standard. But in order reasonably to evaluate the case for embedding patented technology into a standard, industry participants must be aware of the existence, or potential existence, of patent coverage, and must be permitted to explore the additional costs that may be associated with adoption of that technology. In any given case, the better choice may be the patented technology or it may be technology in the public domain; but in all cases, the SSO's choice of which technology to adopt should be an informed choice.

In order to create the conditions under which such informed choices can be made, the great majority of SSOs adopt patent disclosure policies. Such policies have long been central to ensuring that technologies are not adopted as standards without a clear view of the patent landscape. These policies are a codification of both the obligation, and the understanding, of SSO members that good faith must govern their participation in standards setting bodies.

Patent disclosure policies usually vary by organization, and each reflects the collective judgment of the organization's participants as to what disclosure requirements best serve the purposes of the group. Interpretation of a policy adopted by an individual SSO is a factual matter, depending upon, *inter alia*, the language of the policy and course of conduct of organization members under the policy. The jury in this case heard the trial evidence relevant to what JEDEC members understood the JEDEC policy to require during the relevant time period.

Where, as here, a court substitutes its judgment as to what disclosure regime the SSO ought to have adopted for what it actually adopted, great mischief may result. When a patent disclosure policy is thwarted, industry standard setting suffers. In the best case, members find it more difficult and more costly to comply with a court-imposed standard that differs from the one they thought they had agreed to. In the worst case, as Rambus admits happened here, others are able to patent the developing standards in secret and spring their claims upon unsuspecting competitors later, when the cost to change technology has become prohibitive.

### B. The Federal Circuit's Decision Is Constitutionally Unsound And Will Significantly Disrupt The Development Of Open Standards.

The Federal Circuit's decision takes issue with JEDEC's "unbounded" disclosure policy and uses this case as a vehicle to establish an ideological framework for an SSO disclosure policy. This case does not present that opportunity. Instead, this case should have been decided based entirely on the question of whether the factual findings underlying the jury verdict had legally sufficient evidentiary support under the Rules of Civil Procedure as illuminated by this Court. *See* FED. R. CIV. PROC. 50(a)(1) (allowing entry of judgment as a matter of law where "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue").

The submission to the jury of the fraud issue was grounded fundamentally in the notion that standards setting is governed by the same common law that governs the established norms of business behavior that apply in other business transactions. Judgment as to whether particular conduct complies with such norms has traditionally been a

question left for the jury to resolve in accordance with the Seventh Amendment jury right "in suits at common law." *See Granfinanciera, S.A. v. Nordberg*, 493 U.S. 33, 47 (1989) (holding that the Seventh Amendment preserved the right to jury trial in cases involving fraud); *Davis v. Turner*, 45 Va. 422 (1848) (noting the view of an English court that "as to fraud, that is always a question for the jury."). As aptly put by a Virginia court, where this case was tried: "The species of fraud are numberless, and like a chameleon, fraud is always colored by the context from which it arises. For that reason, it is usually for the jury to determine from the facts of a specific case, whether a fraud was committed." *Hirschberg v. G.W. Motors, Inc.*, 34 Va. Cir. 55, 60, 1994 WL 1031181 (1994).

This Court's precedent identifies the limited circumstances in which a Court of Appeals permissibly may overturn a jury verdict without denying constitutional rights. Fidelity to the Seventh Amendment jury trial right is maintained where the court follows the verdict review procedures of Rule 50. *See Neely v. Martin K. Eby Constr. Co., Inc.*, 386 U.S. 217, 321 (1967) (noting that Rule 50 does not violate the Seventh Amendment guarantee of a jury trial). As the Court most recently explained in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149-150 (2000), the proper procedure for review of a jury verdict requires a court to review all of the evidence in the record and to draw all reasonable inferences in favor of the nonmoving party; in so doing, the court may not make credibility determinations or weigh the evidence. Where an evidentiary basis exists for a jury's verdict, "the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion." *Lavender v. Kurn*, 327 U.S. 645, 653 (1946). Moreover, "the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court

might draw a contrary inference or feel that another conclusion is more reasonable." *Id.*

By rejecting the verdict, the Federal Circuit has removed SSOs from these established norms of law and procedure and erected special rules based on policy choices that, in the view of the *amici*, are ill advised. The approach adopted by the Court of Appeals threatens to increase dramatically the cost and uncertainty of private standard-setting efforts in at least three ways. *First*, in making a patent owner's subjective belief about the scope of its patent rights "irrelevant" to the duty of disclosure, the ruling is fundamentally at odds with the expectations of industry participants in SSOs. *Second*, by concluding that Rambus did not breach its disclosure duty based upon a narrow "limitation-by-limitation" analysis of pending patent claims, the decision will make it harder for SSOs to maintain meaningful disclosure policies and for SSO participants to comply with SSO policies. And, *third*, by applying the duty only to final standards, the decision will greatly increase patent owners' leverage in an SSO, obstruct the efficient development of standards, and encourage patent owners to manipulate or abuse the standard-setting process.

### 1. Industry Members Understand Patent Disclosure Policies To Require Disclosure When A Patent Owner Believes Its Rights May Cover A Proposed Standard.

Although the specific terms of the various SSO patent disclosure policies vary, they share many common requirements. Industry members understand that a core requirement of these policies is that members must disclose known patent rights that those participants believe may cover a proposed standard. Another core requirement or expectation is that such a disclosure occur early enough so

that the disclosure may influence the direction of the standard setting process. The basis for this understanding goes to the very heart of private standard setting activities.

A member's subjective belief as to the scope of its pending or issued patents is one of the truest indicators of whether the standard under consideration will face patent challenges in the future. A member is very likely to seek to enforce rights it believes it has, even if its subjective belief is ultimately rejected. Disclosure by the member of its subjective belief in its patent rights gives the SSO an opportunity to investigate the member's claim, the ability to fully evaluate the proposed features and alternatives in light of potential patent coverage, and the ability to ascertain the terms under which licenses may be available should the final standard implicate a member's patent rights. Such possibilities are denied if a member intentionally remains silent until after the standard is finalized.

The trial record in this case shows in clear and unmistakable terms that Rambus, while a JEDEC member, knew that it had patent claims that might cover the SDRAM standard then under consideration by JEDEC. Fed. Cir. App. 2384-2387, 2401-2402. Rambus' CEO, Mr. Tate, admitted that Rambus, while a JEDEC member, tailored its claims to cover the JEDEC standard. *Id.* at 173. Rambus' JEDEC representative, Mr. Crisp, also testified that following JEDEC meetings, he met with Rambus' patent lawyers and tried to draft claims "to make them broad enough that they would cover an SDRAM using the features [he] had seen at the prior [JEDEC] meetings." Pet. App. 46a.

In the view of the *amici*, the concealment of this intentional activity was a clear violation of the norms of conduct generally expected of SSO members. Setting aside whether JEDEC could have defined its disclosure obligation

more precisely, in this case industry members had every right to expect that an SSO member would, at a minimum, disclose the fact that it was drafting patent claims to cover proposed standards. Consistent with this understanding, Gordon Kelley, the JEDEC committee chair, testified that a member who secretly tailored patent claims to cover what was proposed at a JEDEC meeting would be in "complete violation" of JEDEC's disclosure policy. *Id.* at 53a.

The jury agreed, treating these facts as establishing a violation of the Virginia law that governs the norms of business practices and exists precisely for the purpose of disciplining violations of those well-understood norms. Sufficient evidentiary basis for the jury's finding is apparent from the record. The verdict should have been upheld under FED. R. CIV. PROC. 50(a)(1). *See Reeves*, 530 U.S. at 149-150.

Moreover, from a public policy standpoint, the Federal Circuit's decision, which treats Rambus' conduct as "irrelevant," risks disastrous consequences by undermining industry confidence in standard-setting activities and can only encourage deceptive conduct in SSOs.

### 2. The Duty To Disclose Patent Rights Should Not Depend Upon A Formal, Legalistic Patent Infringement Analysis.

The JEDEC patent disclosure policy states that it is "the obligation of all participants to inform the meeting of any knowledge they may have of any patents, or pending patents, that might be involved in the work they are undertaking." To determine whether a member must disclose patent rights to JEDEC, the Federal Circuit stated that the member need not perform "a formal infringement analysis" or a "limitation-by-

limitation comparison" between a patent claim and a standard. *See Warner-Jenkinson Co., Inc. v. Hilton-Davis Chem. Co.*, 520 U.S. 17, 40 (1997) (explaining that the essential inquiry for patent infringement is whether the accused product or process contains elements identical or equivalent to each claimed element of patented invention).

Yet, in overturning the jury's fraud verdict, the Federal Circuit did just that—it "examined" Rambus' pending patent claims, interpreted specific limitations in those claims, and determined that they need not have been disclosed because they included one or more limitations not required by the JEDEC SDRAM standard. To the extent the decision ties the duty of disclosure to the results of a formal, after-the-fact "limitation-by-limitation" claim analysis, the decision is contrary to the language and purpose of JEDEC's patent disclosure policy. To the extent the decision becomes precedent in construing this or other policies in future litigation, it is fundamentally unworkable.

Strong reasons explain why SSOs like JEDEC may prefer a much broader policy than one tied to a narrow infringement analysis like that performed by the Federal Circuit. First, the work of an SSO in considering technologies for possible inclusion in a standard under development involves considering proposals at varying levels of detail and refinement. Many of the proposals will typically not be at such a level as to be evaluated reasonably under a formalistic, claim limitation-by-claim limitation patent infringement analysis. Further, a patent may only become relevant to a proposed standard once other features of the standard are defined. For this reason, an SSO may want to be able to evaluate potential patent coverage issues when those issues might arise. Late disclosure deprives the SSO of an opportunity to choose a different path and burdens the

standard with unwelcome and potentially costly license terms.

Second, a "limitation-by-limitation" approach makes it difficult for the SSO to determine whether a member has violated the patent disclosure policy. Assessing whether a patent claim "reads on" a product or method is among the most challenging problems in the law. Even with the assistance of experts, courts and juries struggle to make infringement determinations. This is not surprising given the complexity of interpreting patent claim language (even for knowledgeable courts), the complexity of technology, and the difficulty of evaluating concepts such as "equivalents." SSOs are not in a position to perform this analysis. Most participants in SSOs are engineers, not patent lawyers, and are untrained in the subtleties of patent claim interpretation. They can not be expected to have the legal knowledge to read patent claims relative to a proposed standard. A broad disclosure rule is much easier and less costly to apply and enforce.

By substituting an infringement analysis for the jury's broader view of what JEDEC required, the Federal Circuit's ruling risks interfering with the private allocation of rights that SSO members have established in the many disclosure policies that now exist. JEDEC plainly could have adopted a disclosure rule that required a claim limitation-by-claim limitation analysis. It did not. It did the opposite. The Federal Circuit's ill-advised policy choice forces on JEDEC a patent disclosure regime never agreed upon by its members and places in doubt the ability of SSOs to formulate their own policies, tailored to the needs of individual industries.

### 3. Applying The Disclosure Duty Only To Final Standards Will Frustrate Standard-Setting Activities.

The Federal Circuit applied the disclosure duty only to formal standard proposals and not to the work leading up to those formal presentations. This, too, risks undermining the efforts of SSOs.

JEDEC's patent disclosure policy expressly applies to patent rights that might be involved "in the work they are undertaking." This language, which plainly applies to the work leading up to the formal balloting of a standard as well as to the actual formal standard itself, promotes efficient, open and pro-competitive standard setting.

Standard setting is a difficult and lengthy process. A standard consists of many pieces that are built upon each other and are fitted together over time. "New" or "revised" standards are often comprised of features taken from a predecessor standard with new features added. The decision to adopt earlier pieces of a standard affects the content and shape of pieces adopted later in the process. It often takes years for all the pieces that make up a standard to come together. In many cases, technology not included in a standard today may be included in an evolutionary standard tomorrow. Because of the interdependence of the pieces of a standard, it is important to many SSOs that members disclose patent rights as a standard develops.

Not requiring disclosure of patent rights that might be implicated by a standard until a "formal" version is proposed would be highly disruptive. If an SSO disclosure duty were so interpreted then a patent owner may choose to conceal its patent rights until the very end of the standard-setting process. Such concealment presents a difficult dilemma for

SSOs. If the SSO decided to abandon the standard because it is covered by previously undisclosed patents, years of effort and industry investment would be wasted needlessly. If, on the other hand, the SSO decides to proceed with the standard in the face of patent rights, industry members may have to pay significant royalties or accept other onerous terms to use the standard. Neither option is a good one. The effect of such a rule would be to endow members having patents covering the standard with a largess, and market power, not earned even by inventors of revolutionary technologies, due to the "lock-in" effect created by the difficulty and cost of changing a standard after it has been finalized.

## CONCLUSION

The Federal Circuit rejected the jury verdict on the simple factual question of whether the conduct in question in this case comports with the normal business practices of an SSO and imposed a patent disclosure regime that is unwise and unworkable. In so doing, the court not only ran roughshod over the constitutional safeguards embodied in the Seventh Amendment. It has also threatened the establishment of open standards so critical to the growth of the world economy, especially in the modern age of technology. For these reasons, the *amici* respectfully submit that the Court should grant the petition for *certiorari* and reverse the Federal Circuit decision.

Respectfully submitted,

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